***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

75-1226

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA

Plaintiff-Appellee,

-against-

RICHARD ANGLADA

Defendant-Appellant.

---

BRIEF FOR DEFENDANT-APPELLANT



APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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## PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction imposed by Hon. John M. Cannella following a jury trial. The defendant was convicted of conspiring to violate 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(A); and with violation of these same sections. He was committed to prison under the Federal Youth Corrections Act.

## ISSUES PRESENTED

(1) IS A DEFENDANT ENTITLED TO A JURY INSTRUCTION ON ENTRAPMENT WHEN HE PRODUCES SOME EVIDENCE THAT THE GOVERNMENT INDUCED HIM TO COMMIT THE CRIME AND THE GOVERNMENT DOES NOT PRODUCE "UNCONTRADICTED PROOF" OF HIS PROPENSITY TO COMMIT THE CRIME?

(2) AN INFORMER, WORKING WITH THE GOVERNMENT, INDUCES THE DEFENDANT TO COMMIT A CRIME. THE DEFENDANT CALLS THE INFORMER AS A DEFENSE WITNESS. ALTHOUGH THE INFORMER WAS AND IS STILL COOPERATING WITH THE GOVERNMENT HE REFUSES, ON FIFTH AMENDMENT GROUNDS, TO ANSWER ANY QUESTIONS ABOUT THE FACTS OF THE CRIME FOR WHICH THE DEFENDANT IS ON TRIAL AND IN WHICH THE INFORMER ASSISTED THE GOVERNMENT AS A COOPERATING INDIVIDUAL. WAS IT ERROR FOR THE TRIAL COURT TO UPHOLD THIS ASSERTION?

(3) DOES A JURY INSTRUCTION THAT INDICATES THAT THE STANDARD OF "PROOF BEYOND A REASONABLE DOUBT" IS A QUANTITATIVE STANDARD VIOLATE DEFENDANT'S CONSTITUTIONAL RIGHTS?

## STATEMENT OF THE CASE

Nieves:

Ralph Nieves, a detective in the New York City Police Department (30)* teamed up with Carlos Santana, a confidential informant also known as Junior (87).

On September 3, 1974, they visited a bodega at 1786 Lexington Avenue in New York City (31).

After Junior made several trips into the bodega, he brought Nieves in to meet Edward Torres (35). Apparently without ever mentioning the name of the product, it was agreed that Torres would meet Nieves the following day at West Houston Street and the Bowery where Torres would sell Nieves something for $1,600, satisfaction guaranteed or the product to be returned (39).

Although Nieves and Santana showed up for the appointment the next day, Torres didn't (41). Santana called Torres on the phone (43-4). Torres said that he had sent his cousin Richie down to meet them, but that the connection did not have the product. As soon as something came up, Torres would let Nieves know (45).

*Numerical references in parenthesis are to the trial transcript. Similar references preceded by the letter "A" are to pages in the Joint Appendix.

The next day, Nieves and Junior returned to the Bowery and West Houston. At about 1:30, Anglada entered their car and Junior introduced him to Nieves (46).* They drove to a bar. Nieves went in while Anglada and Junior went to a frankfurter stand (47). Anglada and Junior then entered the bar. Nieves asked whether it was Torres' stuff he was buying. Anglada said it was and that it would take a "five-hit" (48).

The three of them stayed in the bar about 45 minutes. They returned to the car. Anglada directed them to Spring Street and the Bowery. Nieves parked and Anglada got out, saying he would be right back (49).

Eventually, Anglada and George Shaw drove to Nieves' car (50). Anglada introduced Shaw and he and Shaw entered Nieves' vehicle. Anglada sat in the front passenger seat with Nieves and Shaw and Junior sat in the rear seat (53-4).

Anglada told Shaw to give Nieves the stuff. Shaw put a pack of Kools on the armrest. Nieves ascertained its contents and gave Shaw $600 and Anglada $1,000. Nieves made this division arbitrarily without direction from either Anglada or Shaw (100). Nieves asked Anglada where he could call him. Anglada said through Junior. Anglada and Shaw then left (56).

*The Government did not establish how Anglada came to be there. Anglada did, however, and his testimony is summarized infra. In addition, the genesis of Anglada's participation could have been developed by questioning the informer, whose unavailability is the subject of Anglada's Point II.

Eddie Newton, a New York City police officer, conducted surveillance of the events testified to by Nieves and confirmed his account (137-49).

This concluded the Government's direct case, except for a routine stipulation that the product sold was indeed heroin and further testimony by a chemist, Joseph Barbato, on the quality of the hercin (189 et seq.).

Drucker:

Arthur Drucker, a New York City police detective (208), was called by Anglada. He testified that Junior was a confidential informant and had been so since August, 1974 (211-12). In August, Junior had had a criminal case pending against him (215). Junior used narcotics prior to August, 1974 and subsequent to it, though Drucker did not believe he was using it in the month of August itself (217). The Government stipulated that Junior was arrested in November, 1974, after the events here, and faces life imprisonment on a State charge of selling drugs (219-20).

Anglada's counsel informed the Court that he wished to question Junior but that it would be risky for him to call Junior as Anglada's witness since Junior had refused to speak with him beforehand (221). The Court suggested that Junior was probably a "hostile witness and you could cross-examine him to your heart's content." The Government explained that it was not calling Junior because it believed that "he would take the Fifth Amend-

ment" (222).

Anglada's counsel then emphasized that since Junior had been talking at length with the Assistant United States Attorneys, "he has waived his Fifth Amendment rights" (224).

With this introduction, Junior was called as a witness for Anglada while the jury was temporarily excused (225-26). In response to questions from the Court, Junior admitted that a day or two earlier he had refused to speak to defense counsel. Nevertheless, at the same time, he was speaking freely to the prosecutor and the police about the events of the case (228). On hearing this, Judge Cannella instructed Junior to call his Legal Aid lawyer to the courtroom. Meanwhile, the Court indicated that Junior had probably waived his Fifth Amendment rights (229).

Junior's Legal Aid lawyer appeared and advised him to take the Fifth Amendment. Junior said he would, and the Court took a recess to decide what to do (235). The Court eventually changed its mind, sustained Junior's right to refuse to answer Anglada's questions, and the trial continued (237).

The Post-Trial Hearing:

But before continuing with the trial events here, it is necessary to jump forward to certain testimony taken in a post-trial hearing and included in the Joint Appendix (A61 - A71). At the post-trial hearing

(for the purposes of determining whether there should be bail pending sentence), Detective Drucker testified that he was under the impression that Junior was going to testify at the trial "until I contacted him and he told me that he was unwilling to testify, because he had been threatened" (A61). Drucker, in fact, told Assistant United States Attorney Virella, who was in charge of the case, that Junior would not testify "because he had been threatened" (A62). Mr. Virella knew this prior to the time the case went to trial (A62).

Mr. Virella, Drucker testified, interviewed the informer "several times" prior to trial (A63). The interviews took "more than five hours" (A63). Drucker was present during some of these conversations (A63). Junior told both Drucker and Mr. Virella that the reason he wasn't testifying "was because he had some fear for his own safety" (A64).

At the same post-trial hearing, Mr. Virella testified that a few days prior to the trial, he and Junior discussed "primarily the facts relating to the trial" and "the events with which [the] trial was concerned" (A68). Junior did not invoke his Fifth Amendment privilege at any time in the course of these conversations (A68).

Mr. Virella admitted that at the time Junior declined to testify on Fifth Amendment grounds, he did not call to the Judge's attention that Junior had in fact told him that the reason he would not testify was that

he had been threatened (A69-70).

The Trial Again:

We now return to the trial itself. Anglada testified in his own behalf (251). Anglada was eighteen and a half at the time of the alleged offense (251). Junior was the brother of his then fiance (253).

In early September, 1974, Anglada met Junior at his fiance's house and had a conversation about drugs. Junior implored Anglada for about 45 minutes to an hour, finally convincing him to help Junior purchase an ounce of heroin. Anglada knew that Junior was an addict. Previously, Anglada had given Junior money for shoes and clothing, but Junior would spend it on drugs and had even stolen a leather jacket from his own sister (290-93). This conversation occurred one day before the sale to Nieves (294).

After Anglada agreed to help Junior, he contacted George Shaw. Shaw said he would sell the drugs for $1,600 (294-5). The next day, Anglada told Junior what had happened and Junior suggested meeting on the Bowery and West Houston Street (296-97).

At 1:00 p.m. that same day, after dropping his girlfriend at school, Anglada, who worked nights at the bodega, went home to sleep when he received a telephone call from Junior (297-98). In response, Anglada went to West Houston and the Bowery and met Junior and Nieves. Junior and Anglada went to a restaurant on Canal Street

and Broadway and Nieves went to a nearby bar (298-301).

Anglada denied ever telling Nieves that the heroin could take "five hits" and also denied saying that the heroin belonged to Torres (302-03). Eventually, Nieves, Anglada and Junior drove to Spring Street and the Bowery. Anglada went to George Shaw's house and told George that his fiance's brother was waiting. George said, "Let's go." (304)

Shaw and Anglada joined Nieves and Junior in Nieves' car; Shaw gave a package of Kools to Nieves and Nieves gave Anglada $1,000 and George $600. A siren was then heard and Anglada and Shaw exited the car. Anglada gave his $1,000 to Shaw (305-06). Anglada then went home and didn't hear anything else about the case until he voluntarily gave himself up (307). On cross-examination, Anglada maintained the same testimony as on direct (325).

Shaw:

Shaw also testified. He said that he was a heroin addict (396-97). He first met Anglada a year and a half earlier. They spent a fair amount of time getting "stoned" together (400-02). Shaw never sold heroin to Anglada and Anglada had never before served as a connection for a heroin sale for Shaw (404). In September, 1974, Anglada came to Shaw's house and said he knew someone who wanted to buy an ounce of heroin. They went down to Nieves' car. Shaw sold the ounce (405). Anglada gave Shaw all the money he had received from Nieves, but then Shaw gave

Anglada $100 and a half of a spoon of heroin. Shaw did not see Anglada use the heroin (407). Shaw never knew Anglada to sell heroin (408).

The Charge:

The Court denied Anglada's request for an entrapment instruction (426) despite counsel's legal arguments (430). Instead, the Court instructed on the difference between motive and intent and said that Anglada's motive to help his fiance's brother was "not a legal excuse for committing a crime if, in fact, it was committed" (539-40, 543). The instruction on motive was objected to (553).

The Court also defined different types of evidence for the jury. It said:

> If the Government fails to prove the defendant guilty beyond a reasonable doubt, it is your obligation to acquit him. The two views to present the position in the case is called evidence, and evidence may be described in a number of ways.
>
> First, it can be divided into quantitatively and qualitatively. Qualitatively is the quality of the evidence, by which we mean credible evidence which is believable evidence, quantitatively we mean beyond a reasonable doubt in this kind of a case, in a criminal case. (525)

The Court, a few moments later, continued with this distinction:

> Well, I am reminded of a Roman father that once tried to explain to his sons near the time when he was about to go wherever the Romans went at the end of their life, and he had him bring in some twigs. He had six or seven sons, and then he took the twigs

> and put them together, and as old as he was he simply broke them.
>
> He said, give me another one, and he broke those. He got six or seven and broke them very easily. Then he got to the point where he couldn't break it anymore.
>
> The point which he was making to his sons were, stick together and you will have no problem. The point I make to you is this, it's like circumstantial evidence, a chain of events, other factors have been proven. Have they got to the point where you can't break them anymore when you are discussing a particular area in this case? If you find that they haven't beyond a reasonable doubt, then of course the rules are satisfied. If the twigs aren't enough, or if they break too easily, then you haven't reached that point.
>
> That's a judgment you will have to make using your own common sense which I will talk about a little later. (530-31)

The analogy to the twigs was objected to (553).

## SUMMARY OF ARGUMENT

Anglada makes three arguments. First, he claims that he was entitled to an entrapment instruction on the facts of this case. Second, he contends that it was error for the trial judge to permit a Government informer to avoid testifying about the very case he helped make, for which he could have no criminal responsibility, about which he had already talked and was still talking to the prosecutors at length, where his testimony was important on the issue of entrapment and the right to have the jury consider it and where his apparent real reason for not testifying,

known to the prosecutor, was alleged threats, not self-incrimination. Third, Anglada contends that the Court's instruction on "beyond a reasonable doubt" is both incomprehensible and, in so far as it can be comprehended, wrong.

## A R G U M E N T

### POINT I

### THE JUDGE WAS REQUIRED TO INSTRUCT THE JURY ON ENTRAPMENT.

The testimony adduced in this case required the District Court to charge the jury on the law of entrapment. Judge Cannella, in refusing to do so, misstated the law of this circuit (427), refused to hear counsel's arguments (427) and refused to consider highly relevant evidence which was called to his attention (430).

The facts of this case are essentially undisputed and follow a well-known formula. The informer, Carlos Santana (a/k/a "Junior"), approached the defendant in September, 1974, ostensibly to obtain assistance in purchasing some heroin, when, in fact, his real purpose was to assist law enforcement authorities as well as himself. In September, 1974, the defendant was 18-1/2 years of age, was engaged to be married to the informer's sister and had known for some time that the informer was a heroin addict. In connection with the solicitation by Junior, the defendant testified:

Well, Junior was talking to me for quite a while you know, trying to convince me to do him a favor of getting some drugs for him, and he talked and kept on saying the same things, "Will you do me the favor, will you do me the favor, please. I will come out winning at the end." I told him, "I don't know, Junior." So then he kept on saying, "Please, Richie, I really would appreciate the favor, you know, you are my sister's boyfriend, I want you to help me," and I still told him I wasn't sure. He kept on insinuating with the same thing until he convinced me, and I said, I would let him know.

(290; A8)

* * *

Q. What did Junior say he wanted you to help him get?

A. Some drugs.

Q. Did he say specifically what?

A. Yes.

Q. What did he say he wanted?

A. Heroin.

Q. How much did he say he wanted to get?

A. An ounce.

Q. How long did that conversation last or how long were you in the house with him talking to him at that time?

A. About 45 minutes to an hour.

(293; A9)

Subsequently, the defendant contacted a neighborhood acquaintance, the co-defendant Shaw, whom the defendant knew to be a seller of drugs, but with whom the defendant had had no prior drug dealings. Shaw agreed to make

the sale, which was consummated shortly thereafter in the presence of the defendant, Junior, the undercover detective and Shaw. The Government offered no evidence that the defendant had ever been convicted of a crime or that he had any history of drug dealing or involvement with drug sellers.

The defense of entrapment, if legitimately called upon, must be resolved by the jury because where there is an entrapment, the defendant is not guilty of violating the penal statute under which he is charged, notwithstanding that his "particular conduct is forbidden by the law". Sorrells v. United States, 287 U.S. 435 (1932). See also, United States v. Dehar, 388 F.2d 430, 432 fn. 4 (2d Cir. 1968).

Judge Learned Hand, in United States v. Sherman, 200 F.2d 880, 882 (2d Cir. 1952), formulated the bifurcated inquiry that is still the law in this circuit:

> ... two questions of fact arise. (1) did the agent induce the accused to commit the offence charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offence. On the first question, the accused has the burden; on the second, the prosecution has it.

Inducement, "includes soliciting, proposing, initiating, broaching or suggesting the commission of the offence charged." Sherman, supra. at 883. As to the first element, a "defendant's only burden [is] that

of showing that the Government initiated the crime of which he was convicted." United States v. Pugliese, 346 F.2d 861, 863 (2d Cir. 1965); United States v. Riley, 363 F.2d 955, 958 (2d Cir. 1966); United States v. Cohen, 431 F.2d 830, fn. 2 (2d Cir. 1970). Hence, a "defendant's burden of introducing an issue of fact regarding the 'inducement' by a Government agent or informer is relatively slight." United States v. Henry, 417 F.2d 267, 269 (2d Cir. 1969), although where the question of Government initiation is disputed, the defendant must prove the inducement by a preponderance of the evidence or at least with "some evidence." United States v. Pugliese, supra, at 863; United States v. Braver, 450 F.2d 799, 805 (2d Cir. 1971); United States v. Warren, 453 F.2d 738, 744 (2d Cir. 1972).

Once inducement is shown, the Government may then show propensity by showing:

> (1) an existing course of criminal conduct similar to the crime for which the defendant is charged, (2) an already formed design on the part of the accused to commit the crime for which he is charged, or (3) a willingness to commit the crime for which he is charged as evidenced by the accused's ready response to the inducement. United States v. Viviano, 437 F.2d 295, 299 (2d Cir. 1971); United States v. Becker, 62 F.2d 1007, 1008 (2d Cir. 1933).

Even when propensity is shown, the Judge must still charge the jury on the law of entrapment unless propensity has been shown with "uncontradicted proof" that the accused was "ready and willing without persua-

sion" or "awaiting any propitious opportunity" to commit the offense, United States v. Riley, supra, at 959; United States v. Dehar, supra, at 433; United States v. Greenberg, 444 F.2d 369, 371 (2d Cir. 1971). In determining whether the evidence requires that the entrapment defense be submitted to the jury, the trial court must credit the testimony most favorable to the defendant, United States v. Dehar, supra, at 433; United States v. Cohen, supra, at 832. In other words, where a defendant has met his burden with regard to the inducement and the Government has countered with evidence of propensity, still "the production of any evidence negating propensity, whether in cross-examination or otherwise, requires submission to the jury, however unreasonable the Judge would consider a verdict in favor of defendant to be." United States v. Riley, supra, at 959; United States v. Henry, supra, at 269. This is because the evidence on propensity is no longer "uncontradicted" within the meaning of Riley.

We now apply the "road map" charted by Sherman and its progeny in this Circuit to the facts of this case. Anglada's testimony shows that the Government induced the crime. Whether the burden on the defendant was to produce "slight" or "some" or "a preponderance of" evidence, it was satisfied here. The Government did not contest the fact that its own agent brought about the commission of the offense.

The Court was then required to instruct on entrapment even if the Government showed propensity, unless the Government introduced "uncontradicted proof" of propensity. There are two ways of looking at the Government's proof: Either there was no evidence of propensity or, if there was, it was not "uncontradicted." In either event, the entrapment charge should have been given.

According to United States v. Viviano, supra, propensity can be shown by an existing course of criminal conduct, but here there was no such showing. It can also be shown by an already formed design on the part of the accused to commit the offense, but here too there was no such showing. Finally, it can be shown by a willingness to commit the crime as evidenced by the accused's "ready response" to the inducement, but here, there was no such showing of that either. Anglada testified that it took up to an hour to convince him to assist Junior. Under these circumstances, propensity was not shown and Anglada, with no prior drug convictions and no proof of drug dealing, was entitled to an entrapment charge.

Even if it can be argued that Anglada was "ready" to commit the offense, that argument should have been made to the jury; there was still not the sort of "uncontradicted proof" of propensity that would justify denying an entrapment charge. United States v. Riley, supra,

said that to be "uncontradicted," the proof must show a willingness "without persuasion." Here, there was direct evidence that persuasion was required, and therefore, a jury question. The fact that it took time to convince Anglada to help Junior, distinguishes this case from United States v. Henry, supra, and United States v. Greenberg, supra, where the defendants, respectively, showed either an "unhesitating acquiescence" in the crime or "grasped" at the opportunity to commit it. Here, Anglada testified that there was pressure. "The degree of pressure is properly considered under the element of propensity, as it has direct bearing on the accused's willingness to respond to the inducement of the agent." United States v. Viviano, supra, at 299, fn. 2.

No matter how unreasonable Judge Cannella might have considered a jury verdict in favor of Anglada (419), the case presented an issue of fact on entrapment and the defendant was entitled to have the jury, not the judge, resolve it.

## POINT II

WHERE AN INFORMER INDUCES A CRIME AND THE DEFENDANT ASSERTS AN ENTRAPMENT DEFENSE AND CALLS THE INFORMER AS HIS WITNESS, THE INFORMER DOES NOT HAVE A FIFTH AMENDMENT PRIVILEGE TO REFUSE TO ANSWER QUESTIONS ABOUT HIS UNDERCOVER ROLE AS AN AGENT FOR THE GOVERNMENT.

This point seems tautological. The Government

secures an individual to be an informer. The individual sets a crime in motion. The defendant subsequently calls him to testify about his conduct in setting the crime in motion. Suddenly, the informer becomes unavailable, asserting his Fifth Amendment privilege. Anglada respectfully argues that, on these facts, there is no Fifth Amendment privilege since there is no danger of incrimination.

This point locks into the prior point. Based on the evidence adduced below, Anglada either was or was not entitled to an entrapment charge. He has argued that he was so entitled. If this Court agrees, then Junior's testimony about his efforts to get Anglada to assist him would be directly relevant to the entrapment issue. If, on the other hand, this Court concludes, despite the first argument, that the evidence was not sufficient to warrant an entrapment charge, then Junior's testimony, had the Trial Court required it, might have made the charge mandatory.

Some things are basic. Junior is not criminally responsible for his conduct in assisting the authorities, as a cooperating individual, to purchase controlled substances. In fact, he was in a sense part of the "prosecution team." Cf. United States v. Rosner, F.2d Slip Op. at 3265, 3268 (2d Cir. April 29, 1975). As such it is impossible to understand how any question he might have been asked about the facts of this case could have

incriminated him.

In United States v. Seewald, 450 F.2d 1159, 1161-2 (2d Cir. 1971), this Court said:

> Every citizen, when called as a witness in a criminal case, has the duty to testify to the facts known by him regardless of the detriment or benefit such testimony might bring to anyone ... Therefore, when it is reasonably clear that a witness is protected against criminal prosecution for any matters regarding which he might testify, then the witness must respond to inquiry or face the consequences of contempt. Only if testimony might incriminate one's self may a defendant refuse to testify.

Here, the trial Judge should have required Junior to answer all questions dealing with his participation in the events of the crime then on trial, and especially questions directed toward Junior's solicitation of Anglada's assistance in committing the crime. No answer to any of these questions could have incriminated Junior. While it is conceivable that one or another of counsel might have asked an unrelated question that might have been self-incriminatory if answered, the Judge could have permitted the assertion of the privilege on a question-by-question basis. But a potential witness, especially one with crucial evidence, should not be blanketly excused from testifying. United States v. Winter, 348 F.2d 204, 207 (2d Cir. 1965). It is for the Court to say whether silence on any particular question is justified. Hoffman v. United States, 341 U.S.

479, 486-87 (1951). Cf. Branzburg v. Hayes, 408 U.S. 665 (1972).

Here there is a further complication. As it later developed, and as the Assistant United States Attorney knew all along, Junior's refusal to testify was not based on his fear of self-incrimination, but on his assertion that he had been threatened. Alleged threats are not a permissible reason to refuse to testify. United States v. Seewald, supra.

In addition, the Assistant knew that while Junior refused to testify, he was nevertheless speaking freely and at length with members of the prosecution team, including the Assistant himself, about the very facts of this case. Under these conditions, even assuming that Junior's testimony about the facts of this case could conceivably incriminate him, he waived any such claim. United States ex rel. Carthan v. Sheriff, City of New York, 330 F.2d 100 (2d Cir. 1964).

The error in permitting Junior not to testify takes on greater magnitude in light of the fact that at the time Junior solicited Anglada's participation in the crime, he had an outstanding charge against him. The Court in United States v. Dehar, supra, recognized the important implications to an entrapment defense when the informer has been "offered an opportunity to 'work off [his] bust.'" 388 F.2d at 433.

Anglada respectfully suggests that there is

something a little absurd when an undercover agent participates in a crime, talks to the Government about his participation in the crime, assists the Government in preparing the criminal case for trial, but successfully asserts the Fifth Amendment when the defendant wishes to call the same individual to testify about the same facts ~~regardless of~~ regarding the same crime. Junior's testimony was crucial to Anglada. Cf. Branzburg v. Hayes, supra at 698. There was no danger of self-incrimination if the questions were limited to the facts of the case on trial - the only facts that would appear to be relevant anyway. The Court's decision to permit the assertion of the Fifth Amendment privilege was error.

## POINT III

### THE COURT'S CHARGE ON THE MEANING OF "BEYOND A REASONABLE DOUBT" WAS INCOMPREHENSIBLE AND WRONG.

The Court's charge on "beyond a reasonable doubt," quoted at length earlier, is ungrammatical and nearly incomprehensible. To the extent that the notion behind the charge can be understood at all, it is wrong. It suggests to the jury that the standard of "beyond a reasonable doubt" is a quantitative standard like "clear and convincing evidence" or "a preponderance of the evidence." This is not so. The "beyond a reasonable doubt" standard is a qualitative one.

In In re Winship, 397 U.S. 358 (1970), the Court

emphasized the qualitative requirements of the "beyond a reasonable doubt" standard. It said:

> To this end, the reasonable-doubt standard is indispensable, for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts at issue." Dorsen & Rezneck, In re Gault and the Future of Juvenile Law, 1 Family Law Quarterly, No. 4, pp. 1, 26 (1967). [397 U.S. at 364].

The Supreme Court's reference to a "subjective state of certitude" echoed its earlier holding in Davis v. United States, 160 U.S. 469, 484 (1895) that the "beyond a reasonable doubt" standard is intended to touch upon the "consciences" of the jury. See also Johnson v. Louisiana, 406 U.S. 356, 360 (1972).

An instruction that tells the jury that the reasonable doubt standard is one of degree is improper and results in the denial of a fair trial. Cf. United States v. Johnson, 343 F.2d 5 (2d Cir. 1965). It is true that the Judge also gave the following additional instruction on reasonable doubt:

> What do we mean by reasonable doubt? A reasonable doubt means a doubt that is based upon reason and must be a substantial rather than a speculative doubt.
>
> It must be sufficient to cause a reasonably prudent person to hesitate to act in the more important phase of his life. (525; A16)

This additional instruction does not save the charge. First, the erroneous portion of the reasonable

doubt charge is more than a page in length and overshadows the remainder. Second, the "substantial" versus "speculative" language is also quantitative and does not correct the error. Finally, the last sentence, referring to "the more important phase" of a prudent person's life is a misstatement of the appropriate charge. United States v. Johnson, supra, at 6.

Anglada respectfully suggests that this improper charge on reasonable doubt, which was objected to (553), denied him a fair trial and requires a reversal.

## CONCLUSION

The judgment of conviction should be reversed and the case remanded for a new trial.

Respectfully submitted,

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